Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable	)	MM Docket No. 92-265
Television Consumer Protection	)	
and Competition Act of 1992	)	
	)	
Development of Competition and	)	
Diversity in Video Programming	)	
Distribution and Carriage	)	

MEMORANDUM OPINION AND ORDER

Adopted: August 2, 1994 Released: August 5, 1994

By the Commission:

I. Introduction

1. On October 5, 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[1] The 1992 Cable Act amended the Communications Act of 1934, in part, by adding new Sections 616 and 628. Section 616 governs agreements between cable operators -- or other multichannel video programming distributors ("MVPDs") -- and the programming services they distribute, and directs the Commission to establish regulations that prevent cable operators or other MVPDs from entering into carriage agreements that condition carriage of a vendor's programming on particular concessions.[2] Pursuant to that mandate, on September 23, 1993 the Commission

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] *Id.* Section 616 specifically prohibits a multichannel video programming distributor from requiring a financial interest in the programming services as a condition of carriage; coercing a programming vendor to provide exclusive rights as a condition of carriage; retaliating against the vendor for failure to grant exclusivity; and discrimination in carriage terms between affiliated and nonaffiliated programmers.

adopted general rules consistent with the statute's specific prohibitions in its *Second Report and Order* in MM Docket No. 92-265 ("*Second R&O*").[3]

2. On December 15, 1993, the Wireless Cable Association International, Inc. ("WCA") filed a petition for partial reconsideration of the *Second R&O*. The petition requested that the Commission amend the rules adopted therein to afford standing specifically to any MVPD aggrieved by an alleged violation of Section 616 of the 1992 Cable Act to file a complaint under Section 76.1302(a) of the Commission's rules.[4] WCA's petition was supported by Liberty Cable Company ("Liberty Cable") and GTE Service Corporation ("GTE"), and was opposed by Tele-Communications, Inc. ("TCI") and Liberty Media Corporation ("Liberty Media").

3. In this Memorandum Opinion and Order, we address WCA's petition, the supporting comments, and the oppositions thereto, regarding the scope of standing for complaints filed under Section 616 of the 1992 Cable Act. For the reasons stated below, the Commission finds that it is in the public interest, and consistent with the Communications Act of 1934, to amend Section 76.1302 to afford standing to file a complaint to any MVPD aggrieved by a violation of Section 616. Moreover, we conclude that our regulations proscribing the filing of frivolous complaints[5] are adequate to address any concerns regarding potential abuses of the Commission's complaint process caused by expanding the class of complainants under Section 616.

II. Background

4. The 1992 Cable Act and its legislative history[6] indicate that Congress found that the cable television industry is highly concentrated. Congress concluded that excessive concentration could inhibit the entry of new programmers into the cable industry, thereby

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[3] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992--Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265 (Oct. 22, 1993), 9 FCC Rcd 2642 (1993).

[4] 47 C.F.R. § 76.1302(a).

[5] 47 C.F.R. § 76.1302(q).

[6] House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. (1992) ("House Report"); Senate Committee on Commerce, Science, and Transportation. S. Rep. No. 102-92 , 102d Cong., 1st. Sess. (1991) ("Senate Report"); House Committee on Energy and Commerce, H.R. Rep. No. 102-862 , 102d Cong., 2d Sess. (1992), reprinted in Cong. Rec. H8308 (Sept. 14, 1992) ("Conference Report").

reducing the number of media voices available to consumers.[7] Congress also found that the cable industry had become vertically integrated in that cable systems and programmers are often commonly owned.[8] When drafting the 1992 Cable Act, Congress was concerned that increased horizontal concentration and vertical integration in the cable industry had created an imbalance of power between cable operators and program vendors. Congress concluded, among other things, that vertically integrated cable operators have the incentive and ability to favor affiliated programmers over unaffiliated programmers with respect to granting carriage on their systems.[9] Thus, cable operators or programmers which compete with the vertically integrated entities may suffer harm to the extent that they do not receive the same favorable terms and conditions of carriage.[10] Congress also found that, in return for carriage on the cable system, some cable operators have required certain non-affiliated programmers to grant them exclusive rights to programming, a financial interest in the programming, or some other consideration.[11]

5. Congress sought to address these concerns by including Sections 19 and 12 in the 1992 Cable Act, which added Sections 628 and 616, respectively, to the Communications Act of 1934. Section 628 (containing the program access provisions) primarily restricts the activities of vertically integrated programming vendors and cable operators with respect to other, unaffiliated MVPDs.[12] In contrast, Section 616 was designed to restrict the activities of cable operators and other MVPDs when dealing with unaffiliated programming vendors.

6. We note that, while these sections proscribe certain anticompetitive conduct, Congress also intended to preserve the legitimate aspects of negotiations for multichannel video programming that result in greater availability of programming in the multichannel video marketplace.[13] Indeed, the statute contained the specific directive to "rely on the marketplace, to the maximum extent feasible, to achieve greater availability" of the relevant programming.[14]

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[7] 1992 Cable Act, § 2(a)(4).

[8] Senate Report at 25.

[9] Senate Report at 24; House Report at 41-45.

[10] 1992 Cable Act, § 2(a)(5).

[11] Senate Report at 24; House Report at 42.

[12] On April 1, 1993, the Commission adopted regulations to implement Section 628 of the 1992 Cable Act. See *First Report and Order*, 8 FCC Rcd 3359 (1993) ("*First R&O*").

[13] 1992 Cable Act, § 2(b).

[14] *Id.* at § 2(b)(2).

7. Thus, in implementing the provisions of Section 616, the Commission sought to strike a balance that not only proscribed the behavior prohibited by the specific language of the statute, but also preserved the ability of affected parties to engage in legitimate negotiations.[15] We stated that this flexible approach was consistent with our objective of serving:

> the congressional intent to prohibit unfair and anticompetitive actions without restraining the amount of multichannel programming available by precluding legitimate business practices common to a competitive marketplace.[16]

In addition, we observed that:

> the flexibility inherent in this approach will be important in our overall effort to resolve both carriage agreement and program access complaints, so that our implementing rules for Section 616 do not preclude as 'coercion' any mutually acceptable arrangements that would otherwise comply with the program access provisions of Section 628.[17]

8. WCA, Liberty Cable and GTE contend that Section 76.1302 of our Rules is too narrowly drafted because it does not specifically afford standing to file a complaint to any MVPD aggrieved by a violation of Section 616. Petitioners urge the Commission to amend the scope of Section 76.1302 to affirmatively afford standing to file a complaint to any third party MVPD aggrieved by carriage agreements between other MVPDs and programming vendors that violate Section 616.[18] TCI and Liberty Media oppose the petition, contending, *inter alia*, that Section 616 was intended solely to benefit unaffiliated programming vendors.[19]

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[15] *Second R&O*, 9 FCC Rcd at 2642-43.

[16] *Id.* at 2648-49 (citing *First R&O*, 8 FCC Rcd at 3402).

[17] *Id.* at 2648-49.

[18] Petition for Partial Reconsideration by The Wireless Cable Association International, Inc., Dec. 15, 1993 ("WCA Petition"); Comments on Petition for Partial Reconsideration by GTE Service Corporation, May 24, 1994 ("GTE Comments"); Comments of Liberty Cable Company, Inc. on Petition for Partial Reconsideration, May 24, 1994 ("Liberty Cable Comments").

[19] Opposition of Tele-Communications, Inc. to Petition for Partial Reconsideration, May 24, 1994 ("TCI Opposition"); Opposition of Liberty Media Corporation to Petition for Partial Reconsideration, May 24, 1994 ("Liberty Media Opposition").

III. Summary of Comments

9. Petitioner WCA argues that, in crafting the 1992 Cable Act, Congress chose to promote the emergence of competition to check cable's market power, and that the addition of Section 616 to the Communications Act of 1934 was an instrumental part of Congress' efforts to create a competitive marketplace.[20] WCA states that the record before Congress established that certain horizontally-concentrated Multiple System Operators ("MSOs") had systematically abused their market power to gain control over programming sources and frustrate the development of competitive technologies, and that "Congress expressly recognized that while fair access to programming was a prerequisite for any wireless operator or other MVPD to emerge as a viable competitor, the market power over programmers derived by these MSOs from their *de facto* local monopolies was being abused to frustrate competition." [21]

10. Petitioner WCA notes that the *Second R&O* is silent as to who has standing to file a complaint when a violation of Section 616 occurs. WCA contends that Section 76.1302 could be narrowly interpreted to limit standing solely to programming vendors aggrieved by violations of the carriage agreement provisions, thus precluding a complaint from an MVPD aggrieved by the same anticompetitive behavior. If so interpreted, WCA contends that the very purpose of Section 616 will be frustrated because an MSO with sufficient market power over a programming vendor to coerce exclusivity will be able to employ the same market power to secure that programming vendor's silence. WCA contends that in today's market a programming vendor will not risk alienating a horizontally-concentrated MSO by filing a carriage agreement complaint with the Commission.[22]

11. WCA contends that two recent situations support its claims that aggrieved programming vendors will not file complaints against powerful MSOs: (1) the Chairman of Viacom International, Inc., ("Viacom") testified before the Senate Subcommittee on Antitrust, Monopolies, and Business Rights that Viacom has not complained of alleged anticompetitive abuses by TCI because of its fear of retaliation;[23]and (2) TCI allegedly has been able to coerce cable exclusivity from Fox Broadcasting Network ("Fox") for its new programming service, fX, by implicitly or explicitly threatening to drop Fox's broadcast affiliates from TCI's cable systems and/or refusing to carry fX absent a grant of exclusivity.[24] WCA argues that if wireless cable operators prevented from carrying fX because of such coerced

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[20] WCA Petition at 2-3.

[21] *Id.* at 3.

[22] *Id.* at 4-5.

[23] *Id.* at 5-6 (citing *Communications Daily*, Oct. 28, 1993 at 2).

[24] *Id.* at 6.

exclusivity are barred from complaining by a narrow interpretation of Section 76.1302, there will be no effective method to redress such anticompetitive behavior.[25]

12. Liberty Cable, a satellite master antenna television operator, filed comments in support of WCA's petition. Liberty Cable agrees with WCA's assertion that Congress' enactment of Section 616 implies a Congressional determination that a cable operator could use its control over programmers to impede its competitors. Liberty Cable further states that Congress manifested its concern about the impact of cable operators' coercive and retaliatory practices on both programming vendors and competing MVPDs in the program access and carriage agreement provisions of the 1992 Cable Act.[26] Liberty Cable agrees that the Commission's failure to specifically afford MVPDs allegedly victimized by a violation of Section 616 with standing to file a complaint severely limits the effectiveness of Section 616 and does not comport with Congressional intent. Liberty Cable also contends that an unaffiliated programmer will not risk alienating a powerful cable operator by filing a complaint.[27]

13. GTE, on behalf of its domestic telephone operating companies, also filed comments in support of WCA's petition. GTE contends that the purpose of Section 616 is to protect both video programming vendors and emerging distribution competitors from certain anticompetitive conduct undertaken by cable operators. GTE argues that, since programming vendors are unlikely to lodge complaints against operators which carry their shows, limiting standing under Section 616 to vendors which are party to the contract would frustrate Congressional intent. GTE also contends that the language of the statute does not support this unreasonable result. According to GTE, the plain purpose of Section 616 is to protect not only programmers, but also other MVPDs from prohibited coercive conduct.[28]

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[25] *Id.* at 5-6.

[26] Liberty Cable Comments at 2.

[27] *Id.* at 3.

[28] GTE contends that the language of Section 616(a)(2) itself supports its contention that the statute was intended to protect both programmers and other MVPDs because it directs the Commission to adopt rules that:

> prohibit a cable operator or other multichannel video programming distributor from coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other multichannel video programming distributors as a condition of carriage on a system.

GTE Comments at 2.

14. TCI filed an opposition to WCA's petition. TCI contends that the program carriage provisions in Section 616 were enacted solely for the benefit of programming vendors, and that the interpretation requested by WCA is at odds with the language of Section 616 and its legislative history. With respect to the language of Section 616, TCI contends that there is no mention of complaints to be filed by MVPDs, referring to the provision in Section 616(a)(4) for expedited review of "complaints made by a video programming *vendor* pursuant to this section," (emphasis added) and the definition of "video programming vendor" in Section 616(b).[29]

15. TCI further contends that the legislative history of Section 616 mandates rejection of WCA's requested interpretation. TCI notes that both the Conference Report and the House Report include references to expedited review of all complaints made under this section of the Act.[30] According to TCI, if WCA is to prevail, it must convince the Commission that Section 616(a)(4) merely requires the Commission to give expedited treatment to complaints filed by programming vendors, while allowing non-expedited review for all other carriage agreement complaints. Thus, TCI concludes that the legislative history confirms that Congress intended that only programming vendors be permitted to file complaints under Section 616 of the Act.[31]

16. TCI responds to WCA's claim that cable operators will be able to coerce both exclusivity and silence from programming vendors by noting that Section 616(a)(2) expressly prohibits an MVPD not only from coercing exclusivity from a programming vendor, but also from retaliating against such a vendor for failing to provide exclusivity. According to TCI, this provision gives a programming vendor an opportunity for prompt and full redress if its rejection of a coercive demand is met with retaliation and voids any claim by WCA that the carriage agreement provisions will be weakened if competing aggrieved MVPDs are not permitted to file complaints.[32]

17. TCI further contends that the program access provisions in Section 628, rather than the carriage agreement provisions of Section 616, provide the appropriate avenue of

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[29] TCI Opposition at 3-4. Section 616(b) defines "video programming vendor" as "a person engaged in the production, creation, or wholesale distribution of video programming for sale."

[30] TCI cites the statement in the Conference Report that Section 616(a)(4) provides for "expedited review of any complaints brought pursuant to" Section 616. Conference Report at 82 (1992). TCI also cites to the statement in the House Report statement that "[t]he FCC's regulations shall provide for expedited review of complaints made pursuant to this section . . ." House Report at 111.

[31] TCI Opposition at 5-6.

[32] *Id.* at 5-6.

redress for MVPDs. TCI contends that Section 628 of the Act, and the implementing rules promulgated by the Commission, allow exclusive contracts to be contested by third parties when the Commission makes its determination as to whether they are in the public interest,[33] while Section 616 allows video programming vendors to protect themselves from any coercive tactics which might be employed by MVPDs. According to TCI, the purpose of Section 628, and not Section 616, is to "promote the public interest, convenience and necessity by increasing competition and diversity in the multichannel video programming market . . . "[34]

18. Finally, TCI argues that allowing MVPDs standing to file complaints under Section 616 will discourage parties from entering into contracts, including those that are in the public interest, because parties will not want to face the Commission's examination of their negotiating behavior. In addition, TCI claims that this will chill exclusive agreements that are in the public interest by allowing MVPDs to use the Section 616 complaint process to obtain potentially useful information regarding a rival's business practices.[35]

19. Liberty Media also opposes WCA's petition, reiterating many of the same arguments made by TCI. Liberty Media contends that Section 616 and the Commission's implementing rules make it clear that only video programming vendors have standing. Liberty Media argues that the Commission's authorized remedies such as "mandatory carriage of complainant's programming" in Section 76.1302(s)(1) make sense only with respect to complaints brought by video programming vendors. Moreover, Liberty Media contends that other provisions in the implementing rules, including the notice provisions in Section 76.1301(a) and the statute of limitations provision in Section 76.1302(r), are premised upon a video programmer complainant.[36] Liberty Media also contends that, while the Commission sought to "strike a balance" in its regulations between proscribing prohibited behavior and

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[33] *Id.* at 7 (citing 47 C.F.R.§ 76.1002(c)(5) and 47 C.F.R.§ 76.1003).

[34] *Id.* at 7 (citing 47 U.S.C.§ 548(a) (1992)).

[35] *Id.* at 9-10. TCI contends that WCA's allegations regarding TCI's coercion of cable exclusivity for Fox's fX programming service is a prime example of the type of abuse that could result if WCA's petition prevails. TCI claims that although WCA's contention is without merit, if WCA prevails in its petition, it could then file a complaint under Section 616 and thereby delve into the intimate details of the business relationship and negotiations between TCI and Fox. *Id.* at 10.

[36] *See* Liberty Media Opposition at 3. Section 76.1302(a) provides, in part, "[a]ny aggrieved video programming vendor intending to file a complaint under this section must first notify the defendant . . . " Section 76.1302(r) states, in part, that complaints under the carriage agreement provisions must be filed within one year of certain events, including when "the multichannel video programming distributor enters into a contract with the complainant that the complainant alleges to violate [sic] one or more of the rules contained in this subpart . . ."

preserving legitimate negotiations, WCA's proposal would destroy that balance by interjecting third parties into private negotiations or by permitting third-party discovery.[37]

20. In response to TCI and Liberty Media's opposition, both WCA and GTE filed Replies.[38] WCA contends that neither TCI nor Liberty Media identified a single provision in the 1992 Cable Act or its legislative history that expressly calls for the Commission to deny an aggrieved MVPD standing to complain when Section 616 is violated. WCA contends that while it appears that Congress gave little, if any, attention to which entities should be entitled to complain when a programmer is coerced into giving exclusivity, Congress was concerned with the impact that coerced exclusivity has on programmers as well as on the ability of emerging technologies to obtain the volume of programming necessary to compete.[39]

21. WCA further argues that TCI and Liberty Media's reliance on Sections 616(a)(4) and 616(b) are without merit and ignore that Section 616(a)(6) expressly contemplates that persons other than video programming vendors will be filing complaints. Section 616(a)(6) specifies that the Commission is to "provide penalties to be assessed against *any person* filing a frivolous complaint pursuant to this section".[40] According to WCA, if TCI were correct, and Congress only contemplated that video programming vendors would be entitled to file complaints, this section would have called for the Commission to provide penalties to be assessed against only video programming *vendors* filing frivolous complaints.[41]

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[37] Liberty Media Opposition at 6.

[38] Reply of The Wireless Cable Association International Inc., June 3, 1994 ("WCA Reply"); Reply Comments on Petition for Partial Reconsideration of GTE Service Corporation, June 3, 1994 ("GTE Reply").

[39] For example, WCA refers to the findings in the Senate Report that:

> In addition to using its market power to the detriment of consumers directly, a cable operator with market power may be able to use this power to the detriment of programmers. Through greater control over programmers, a cable operator may be able to use its market power to the detriment of video distribution competitors.
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> * * * * * *
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> [T]he Committee continues to believe that the operator in certain instances can abuse its locally-derived market power to the detriment of programmers and competitors.

Senate Report at 23-24; *see also* House Report at 42-44; WCA Reply at 4.

[40] 1992 Cable Act, § 616(a)(6) (emphasis added).

[41] WCA Reply at 5.

22. WCA also responds that Section 628 does not necessarily provide an effective remedy when a cable operator coerces exclusivity from a non-vertically integrated programming vendor. WCA contends that Section 628 is designed to address problems associated with vertical integration and is limited in scope to those situations where vertical integration proves problematic, and it is not implicated when a cable operator coerces an exclusive programming agreement from a programming vendor that is not vertically integrated.[42] Finally, WCA addresses TCI and Liberty Media's contention that WCA's petition, if granted, will lead to abuse. WCA contends that in order to avoid such abuses, Section 616(a)(6) of the 1992 Cable Act imposes penalties on those filing frivolous complaints.[43]

23. GTE also asserts that Section 628 does not reach all of the conduct prohibited by Section 616.[44] Moreover, GTE disputes Liberty Media's suggestion that Congress' express identification of one specific remedy for violations of Section 616 limits standing to video programming vendors, pointing out that the precise language of the statute directs the Commission to provide for appropriate penalties and remedies for violations of Section 616 "including" carriage.[45] According to GTE, this permissive language does not limit the Commission's ability to fashion appropriate penalties and remedies with respect to injured MVPDs. Finally, GTE argues that Congress specifically identified MVPDs as parties which could be injured by Section 616 prohibited conduct. Thus, according to GTE, limiting standing to video programming vendors contradicts the remedial intent of Congress by leaving parties specifically injured by the proscribed conduct without redress and is also contrary to accepted rules of statutory construction.[46]

IV. Discussion

24. The Commission has determined that it is in the public interest to grant WCA's petition and to amend our implementing rules to specifically afford standing to MVPDs to file complaints under Section 616 of the 1992 Cable Act. Based upon the record before us and the criteria set forth in the 1992 Cable Act and its legislative history, we believe that it serves the public interest if all potential violations of Section 616 are brought to the Commission's

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[42] *Id.* at 6.

[43] *Id.* at 6-7.

[44] GTE Reply at 3. GTE argues in the alternative that if the Commission dismisses WCA's petition, the Commission must clarify that a MVPD may complain under Section 628 for conduct otherwise proscribed by Section 616.

[45] *Id.* at 4 (quoting 47 U.S.C. § 536(a)(5) (1992)).

[46] *Id.* at 4-5.

attention. The statutory purpose of Section 616 is further served if the Commission is made aware of such violations through complaints by both programming vendors and MVPDs alike. Indeed, the mere threat of potential complaints by allegedly aggrieved competing distributors is an added check on potential anticompetitive behavior by MVPDs with respect to carriage agreements. While we are affording standing to MVPDs to file complaints under Section 616, we emphasize that such complaints must be based on documentary evidence or testimony in the form of affidavits, and may not merely reflect conjecture or allegations based only on information or belief.[47] We believe that Section 76.1302(q) of our rules will afford adequate protection against any potential frivolous complaints as a result of our decision on this issue.[48]

25. Moreover, Liberty Media misplaces its reliance upon *Sterling Suffolk Racecourse L.P. v. Burrillville Racing Ass'n, Inc., 989 F. 2d 1266, 1270 (1st Cir. 1993), cert. denied,* 114 S. Ct. 634 (1993) (*"Sterling Suffolk"*), as support for its argument that neither federal agencies nor courts can substitute their judgment for that of Congress in extending standing to seek relief under federal statutes.[49] In *Sterling Suffolk*, the First Circuit held that in determining whether a private cause of action is implied in a federal statute, a court's central focus must be on congressional intent. The court listed three questions to discern this intent: (1) is the plaintiff one of the class for whose particular benefit the legislation was enacted; (2) is the remedy sought consistent with the underlying purposes of the legislative scheme; and (3) is the cause of action one traditionally relegated to state law? We disagree with Liberty Media's application of this standard to the issue before us on reconsideration as the question of a private right of action in court is different from the question of whether a party may bring an alleged statutory violation to an agency's attention. In any event, we believe that in this case the first two questions are answered in the affirmative. The third question has not even been raised as an issue by the parties and clearly is not relevant here.

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[47] Consistent with the *Second R&O*, an aggrieved distributor filing a complaint under Section 616 will have the burden of proof to establish a prima facie showing that the defendant multichannel distributor has engaged in behavior that is prohibited by Section 616. The complaint must identify the relevant Commission regulation allegedly violated, and must describe with specificity the behavior constituting the alleged violation. The complaint must be supported by documentary evidence of the alleged violation, or by an affidavit (signed by an authorized representative or agent of the complaining distributor) setting forth the basis for the complainant's allegations. The complaint should specify the relief requested. If the complainant seeks mandatory carriage, the complaint should specify the desired duration and terms of such carriage, and should include the rationale and any documentary evidence supporting such request. *Second R&O*, 9 FCC Rcd at 2654. As noted in the *Second R&O*, a one-year statute of limitations will be applied to program carriage complaints. *Id.* at 2653.

[48] 47 C.F.R.§ 76.1302(q); *see infra* ¶ 32.

[49] Liberty Media Opposition at 4.

26. There is nothing in the statute that limits standing only to aggrieved video programming vendors. Opponents point to Section 616(a)(4)'s reference to "expedited review of any complaints made by a *video programming vendor* pursuant to this section" (emphasis added) as a limitation on standing.[50] In contrast, as noted by WCA, Section 616(a)(6), appearing two sentences later in the statute, suggests otherwise. That section requires the Commission "to provide penalties to be assessed against *any person* filing a frivolous complaint pursuant to this section",[51] suggesting that Congress intended to provide for a broader class of complainants than just programming vendors aggrieved by the specified conduct. Thus, in addition to the fact that there is nothing in the language of Section 616 which precludes standing to aggrieved MVPDs, such standing also fits well within the statutory purpose.

27. Further, we do not find anything in the legislative history of Section 616 that limits standing only to video programming vendors. To the contrary, the underlying premise of the program access and carriage provisions of the 1992 Cable Act was to increase competition to franchised cable operators from other MVPDs, reducing the undue market power held in noncompetitive markets by cable operators as compared to that of consumers and video programming vendors.[52] The legislative history shows that Section 616, like Section 628, was designed by Congress to prohibit unfair or anticompetitive actions without precluding legitimate business practices common to a competitive marketplace.[53] Indeed, Congress routinely treated Sections 616 and 628 in concert, thereby confirming its concern for the impact of anticompetitive conduct on programmers and on emerging MVPDs' access to programming. Thus, far from precluding an aggrieved MVPD from seeking relief under Section 616, the legislative history surrounding this section supports standing for such entities.

28. Moreover, as pointed out by petitioner WCA, a discussion by the Senate Committee on Commerce, Science and Transportation regarding what ultimately became Section 616 of the 1992 Cable Act, as passed by both houses of Congress, shows that in passing Section 616, Congress was concerned with the effect a cable operator's market power would have both on programmers and on competing MVPDs:

In addition to using its market power to the detriment of consumers directly, a cable

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[50] We do not believe that because the statute provides for expedited review only of programming vendor complaints, it then follows that aggrieved MVPDs are precluded from filing complaints on a non-expedited basis. Rather, expedited review of programming vendors complaints is consistent with the fact that such vendors will be the ones most immediately impacted by a Section 616 violation.

[51] 1992 Cable Act, § 616(a)(6) (emphasis added).

[52] *See, e.g.*, 1992 Cable Act, § 2(a)(2).

[53] *Second R&O*, 9 FCC Rcd at 2643.

operator with market power may be able to use this power to the detriment of programmers. Through greater control over programmers, a cable operator may be able to use its market power to the detriment of video distribution competitors.[54]

29. Contrary to TCI's and Liberty Media's assertions, the substantive differences between Section 628, which clearly grants standing to aggrieved MVPDs, and Section 616 support our decision to grant WCA's petition. Section 628 does not address all conduct proscribed under Section 616.[55] Whether or not the behavior at issue constitutes a violation of Section 628, however, we see no reason to deny MVPDs standing to file complaints for violations of Section 616.

30. Moreover, we share the concerns raised by WCA, Liberty Cable and GTE that programming vendors which may have been coerced into granting anticompetitive concessions to MSOs could lack the incentive to file a complaint because of potential damage to their future business relationships with such MSOs. TCI's assertion that Section 616 also prohibits retaliatory conduct by a cable operator against a programming vendor who refuses to grant exclusive distribution rights does not answer this concern. If an MSO has the market power to coerce the programming vendor to grant anticompetitive concessions in the first place, that the statute also proscribes retaliation by that MSO for failure to grant such concessions hardly provides additional incentives for that programming vendor to file a complaint if it is already too intimidated to report the coercion.

31. Thus, for the reasons discussed above, we conclude that it is in the public interest to amend the carriage agreement rules in accordance with WCA's petition. While we believe this approach is entirely consistent with the purpose and intent of the 1992 Cable Act, and indeed necessary to fully implement Section 616, we further note that it is well within the Commission's general authority in Sections 4(i) and (j) of the Communications Act of 1934,

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[54] Senate Report at 23-24.

[55] Section 628(b) provides that:

> [i]t shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

47 U.S.C. § 548(b)(1992).

as amended,[56] to amend our rules in this manner.[57]

32. Finally, while we believe that amending the rule to grant standing to MVPDs aggrieved by violations of Section 616 serves important public interest goals, we also are mindful of the potential abuses that can result from the complaint process. In this regard, we note that Section 76.1302(q) of our rules specifically provides that:

> [i]t shall be unlawful for any party to file a frivolous complaint with the Commission alleging any violation of this sub-part. Any violation of this paragraph shall constitute an abuse of process subject to appropriate sanctions.[58]

33. We intend to strictly enforce this prohibition against frivolous complaints. Furthermore, we caution that complaints filed pursuant to Section 616 must be based on documentary evidence or testimony in the form of affidavits, (signed by an authorized representative or agent of the complaining party) and may not merely reflect conjecture or allegations based only on information and belief. In this manner, we believe that the Commission's rules afford adequate protection against any potential frivolous complaints filed as a result of our decision to expand the scope of parties with standing to file carriage agreement complaints pursuant to Section 616.

34. For further information in this proceeding, contact Nancy Markowitz or Diane Hofbauer, Cable Services Bureau, (202) 416-0856.

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[56] Section 4(i) provides, in part, that the Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." Section 4(j) provides, in part, that the "Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. §§ 154(i), (j).

[57] *See, e.g., Federal Communications Commission v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 790 (1978); *Federal Communications Commission v. Schreiber, 381 U.S. 279 (1965) ("Schreiber"); RKO General, Inc. v. Federal Communications Commission*, 670 F.2d 215, 232-33 (1981). In *Schreiber*, for example, the Supreme Court noted that under Section 4(j) of the Communications Act, "Congress has 'left largely to [the Commission's] judgment the determination of the manner of conducting its business which would most fairly and reasonably accommodate' the proper dispatch of its business and the ends of justice." 381 U.S. at 289.

[58] 47 C.F.R. § 76.1302(q); *see also* 47 U.S.C. § 503(b).

V. Regulatory Flexibility Act Analysis

Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Sections 601-602, the Commission's final analysis is as follows:

35. Need and purpose of this action: This action is taken to implement Section 12 of the Cable Television Consumer Protection and Competition Act of 1992.

36. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis: There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

37. Significant alternatives considered: We have analyzed the comments submitted in light of our statutory directives and have formulated regulations which, to the extent possible, minimize the regulatory burden placed on entities covered by the program carriage agreement provisions of the 1992 Cable Act.

38. Federal Rules which overlap, duplicate or conflict with these rules: None.

39. Paperwork Reduction Act Statement: The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose no new or modified information collection requirements on the public.

VI. Ordering Clauses

40. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), and Section 616 of the Communications Act of 1934, as amended, 47 C.F.R. Sections 76.1302, 76.1302(a), 76.1302(r) and 76.1302(s) ARE AMENDED as set forth in Appendix A.

41. IT IS FURTHER ORDERED that, the regulations established in this Memorandum Opinion and Order shall become effective thirty days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary